Family news - spring: Charman - offshore trusts a resource in onshore divorce

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The case of Charman is the first English "big money" case to be decided after the House of Lords' judgments in Miller and McFarlane in May 2006. As such, it has been keenly awaited as key to the interpretation of those judgments. In addition, as a significant wealth was held in an offshore trust, it is an important decision regarding the treatment of trusts on divorce.

The facts

Both spouses were aged 53. It was a long marriage. They had two grown up children. The Wife had given up paid employment to look after the children.

The Husband had a distinguished career in insurance.

In 1987, he settled two Jersey Trusts, the J R Charman Children's Settlement (the "Children's Trust") and the Dragon Trust ("Dragon"). The Husband and Dragon retained large shareholdings in the Husband's successive business ventures.

In 2001, in the wake of the 9/11 tragedy, the Husband set up Axis Specialty. The Husband was appointed CEO of the new company, established in Bermuda. In early 2003, when he moved to Bermuda and became non-resident in the UK for tax purposes, the two trusts were moved to Bermuda to be administered by a Bermudian trustee and the proper law was changed to Bermuda. The marriage then broke down.

The case

This was the final hearing of the Wife's financial relief claim against the Husband.

Although there was argument as to how the holdings in Axis should be valued, at trial the Husband held approximately £56m of assets in his own name, the Wife held approximately £6m in her own name and Dragon held approximately £68m. The total assets were over £130m.

The most important issue was whether the assets in Dragon should be included in the total pot to be divided between the parties. The Husband's stance was that, as he had always intended that the assets in Dragon be preserved for the benefit of future generations, they should not be considered available. The Wife disagreed and said that as the Husband had never expressly said that Dragon should be treated in this way, and as he had provided no evidence to prove his argument, the whole value of Dragon should be included. The judge held Dragon should be included fully as the Husband's resource, and treated as if the assets within it were available to him.

He doubted the ability to create a dynastic trust, which would be effective on divorce, from assets built up during the marriage.

After reviewing the House of Lords' decisions in Miller/McFarlane he held that fairness dictated that he take into account the Husband's 'remarkable' abilities in the insurance world. It was clear to him that their product was "wholly exceptional". Therefore an adjustment from equal division was fair and any such adjustment ought to be "meaningful and significant and not a token one." In the absence of guidance from the House of Lords, he arrived at an award which took into account the Husband's exceptional contribution, although without any basis on a scale or any other similar theory. He was confident in making the award that, in spite of an adjustment to recognise the Husband's exceptional contribution, the Wife's needs would be easily met.

The Wife was awarded a total of £48m, including the £6m she already had, the Husband's interest in the former matrimonial home and a lump sum of £40m. This represented 37% of the total assets in the case.

Going forwards, the implications for practitioners may be summarised as follows.

- Significant trust assets are not immune from the Court's discretion on divorce and may be treated as falling into the "matrimonial pot". Detailed advice should be sought from a "divorce planning" and "tax planning" perspective when trusts are set up.
- Special contribution to the accumulation of the family wealth is still a reason for a departure from equality when matrimonial assets are divided. Any departure on this ground should be meaningful and significant.

- In big or even huge money cases, there is still a degree of judicial uncertainty and a consciousness of the difficulty in arriving at “fair” conclusions. In that respect, family law is far from settled and will inevitably continue to develop.

Withers LLP acted for John Charman in the case described above.

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